Dany A. Rojas-Vega
100 Metros al Sur y 60 Metros al Oeste
De la "discoteca el "Priviligio"
Cocal-Puntarenas Costa Rica, Central America
Email:danyrojas4@gmail.com
Contact Phone # 619-752-8894
Appearing: ***Pro-Se***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROJAS-VEGA
Plaintiff-Petitioner,

Vs.

USCIS, et al.,
Defendants.
/

Civil Docket Number: _____

NOTICE OF FILING FOIA COMPLAINT IN THE DISTRICT COURT OF COLUMBIA

Please take notice that Dany Rojas-Vega, the Plaintiff in pro-se capacity respectfully moves this District Court for the District of Columbia for permission to file his FOIA action in ROJAS-VEGA v. UNITED STATES CITIZENSHIP IMMIGRATION SERVICE, 13-CV-172-LAB(BGS)(Dist. Court, SD California, 2013) in this district court in-accordance with and pursuant to the District Judge the Honorable *Larry Alan Burns*, order dismissing *sua sponte*, FOIA complaint for improper venue ***without prejudice*** to refiled in a forum where venue is proper. See Attached order dated July 03, 2013. (See Docket no. 10.)

I. Order

The Honorable district judge LARRY ALAN BURNS found that the documents Plaintiff seeks had some historical connection to the Southern District of California. In addition, the district court declared that Defendants are not maintaining the sought after documents in the District Court for the Southern District of California. The court relied on Defendants withholding letter's showing the agencies are located in Washington D.C or at National Records Center in Missouri. (*See* Docket no. 10 at 2 ¶¶ 23-28). Even *after* the Court expressed doubt in its order at where the

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records are truly located when it stated that; "even if.. .agency is keeping copies of documents in this District, and even if those documents 'contain the same the same information that is in ICE's *own records*. .(*See id* 2 at ¶¶ 20-22). The court did not put much weight to USCIS-Chief FOIA officer of the records division Dominick Gentile sworn under penalty declaration declaring that ICE maintains their own systems of records (*See id* at 2 ¶¶ 4-7); that ICE is well known in certain cases ("like in Plaintiff's request") of holding back (or omitting altogether from request) vital documents from requesters by not transferring documents to a USCIS systems of records for processing. (Docket no. 8. 2 at ¶¶ 27-28: *id.* at 3 ¶¶ 1-10). Thus, venue is proper in this district court for the distrct of Columbia.

II. Clarification And Correcting Error

Plaintiff moves the court for permissin to clarify two dispositive issues and correct the error (found in docket no 10. ORDER at 2 ¶¶ 10-20) the record needs the following corrected;

1. This dispute is **not** over a request filed under Government Code §§ 6250-6276 of the California Public Records Act, for copy of the state transcripts held by the state

2. The error that requires correcting is that this **dispute** and **challenge continues** be **over** a request he originally filed under 5U.S.C. § 552, *et seq.*, and 5 U.S.C. § 552a, *et seq.*, . for copy of the state transcripts held by Defendant INS. (*See;* attached **Complaint** (Compl.) to be filed at pgs 4-5 ¶¶ 8-9.) which INS search staff INS chose to withhold 25 pages in its entirety and deleted portions of four pages responsive to Plaintiff specific request. (*See;* attached Compl. pgs 3; 13-14 ¶¶ 16-18.) Applying the *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C.Cir.1996) ("create or obtain) *Tax Analysts*, 492 U.S. 136, 144 '(control and possesion) test to the state transcripts that INS had already obtained from the state before it destroyed their own record which Plaintiff requested and agency withheld. They fall within FOIA's reach.

Establishing Plausibility Claim Through Procedural Safeguards

8. Title 6 Part 5 Disclosure of Records And Information— of the Department of Homeland Security (DHS)— Subpart A—Freedom of Information Act—Electronic Code of Federal Regulations (CFR) will be relied on as both defendant agencies own regulations which was clearly promulgated when request was processed in the present request Rule 5.1 instructs components of DHS to read its own standard for public access to documents that have come into agency's possession and is maintained by them in the legitimate conduct of official its business.

(iv). FIRST FOIA REQUEST
REQUEST SND2003002513

9. On June 02, 2003, Plaintiff filed his first FOIA request specifically requesting the October 06, 1995 state proceedings and on July 25, 2003 INS responded by withholding records responsive to specific FOIA request. See; 8 C.F.R. § 103.10(b)(3). [5] INS-ICE failed to issue a warning letter stating that 2003 request did not reasonably describe the records sough. Procedural safeguard of Rule 103.10(a) precludes ICE from *post hoc* claiming that his request did not *reasonably describe the records sought*. Because 5 U.S.C. § 552 (a) (3) (A) only requires the requester to adequately identify the records whsich are sought. In this case' the request was in a concise and explicit manner not only did it described the exact record sought as relating to the state court proceedings, but also pinpointed and narrowed the scope of the search by

1. Giving the precise date and time the proceedings took place,
2. Identified the specific Court, City, County where it occurred,
3. Gave the state case number the documents are identified under,

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[5]/ Rule § 103.10(b)(3) provides in important part that; "Each request made under this section pertaining to the availability of a record must describe the record with sufficient specificity with respect to names, dates, subject matter and location to permit it to be identified and located... *If it is determined that the request does not reasonably describe the records sought*, the response rejecting the request on that ground shall specify the reason why the request failed to meet requirements and shall extend to the requester an opportunity to confer with Service personnel to reformulate the request.

See Doc. 7-2 at Exhibit 11; the procedural safeguards of 8 C.F.R. § 103.10 (b) (3) and 6 C.F.R. § 5.6 (c) legally and factually obligated INS to have originally notified Plaintiff that;

> **1). The record was not located or; 2). Did not exist; 3). Was not readily reproducible in the form or format, or even; 4). The record sought was not subject to the FOIA**

(*Extra emphasis added*), thus, based the presumption that the file was located, INS processing employee reviewed the A-File to determine if whether it is releasable exempt from disclosure. See; 6 C.F.R. § 5.11 (8), 6 C.F.R. § 5.11 (8) required agency to review the record

> Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure).. . . .

Additionally, Chief Dominick Gentile of USCIS record division filed a declaration in the Arizona District Court executed on June 11, 2010 from Washington D.C declaring in ¶ 6 that

> Once the A-File is located, a USCIS employee will review it to determine whether it relates to the subject of the request. If USCIS determines that it has located the correct A-File, a USCIS employee will conduct an initial review of the A-File to determine whether any information is not releasable, for example, because it belongs to an agency outside of DHS or it is privileged.

Web; http://www.justice.gov/opa/documents/declaration-of-dominick-gentile.pdf; In this case this examination of the state transcripts required for the search employee to have been familiarized or be specialized with the subject matter when reviewing the state transcripts or required a second opinion from a supervisor to determine if whether the state transcripts were in fact exempt from disclosure before it was exempted them from disclosure.

(v) SECOND FOIA-USCIS FINDING NRC2008055319AND 2009; FOIA APPEAL APP2009000724 *POST HOC* FINDING

10. Procedural safeguards of 8 C.F.R. § 103.10 (b) (3) and 6 C.F.R. § 5.6 (c) did not

authorized USCIS appellate division from ***post hoc*** changing the initial finding dated June 17, 2009, in processing number NRC2008055319 that the processing employee made from "**not being able to** "***locate*** the transcripts" to the state transcripts "**not existing**" in the A-file at the + time the request was processed. The grounds to deny appeal transcended far beyond the actual initial finding of not being able to locate transcripts to ***post hoc*** **not** existing by concluding that;

> "[A]ccording to several pages previously sent to you, the tapes from October 1995 no longer exist." "[P]lease see the Municipal Court of the State of California…Writ of Error Coram Nobis."

The present search request Chief Gregory's finding was used in a different context, the context that finding was used to demonstrate that USCIS knew exactly that the "tapes/transcripts from October 1995 state proceedings" were the documents that was actually withheld from Plaintiff in 2003. Secondly it also demonstrated that USCIS did not state that they themselves destroyed the record but that the state destroyed their own copy of the state 19995 proceedings.. These findings prompted the filing of the third request challenging the adequacy of the 2009 search and findings.

(vi) THIRD FOIA REQUEST
FOIA APPEAL OPLA13-722

11. The third FOIA request which is the subject of this action, Plaintiff filed a combination of two separate letters (discussed more clearly below), the May 2013 letter was a seven page request letter contained a 3 page table of contents, authorities and exhibits, the second letter was a four page letter, for USCIS to specifically search for the missing records that it was unable to locate in its own file and refrain from the urge to look to or rely on state documents or state files to determine that the state transcripts did not exist in agencies own A-File because based on *Dent v. Holder*, 627 F. 3d 365, n.4, n.11(9th. 2012) and Chief Dominick Gentile declaration, all

databases systems containing A-Files are controlled by USCIS, which ICE maintain their own records. See; Response to Order to Show Cause Why Venue Is Proper at 2-3 (See; Doc. No.7) Therefore Chief Gregory's grounds to deny Plaintiff's FOIA appeal in 2009 was legally **un**founded and **in bad faith**, because whether the State destroyed their own copy of the record responsive to request " *it did not effect that record that was already obtained by agency from the State, requested by Plaintiff and withheld from Plaintiff by former INS*." Thus, the records responsive to FOIA request was simply missing and misplaced and continues to be in the possession, custody and control of USCIS. That the 2003 withheld record was at no time in state custody one INS/ICE obtained them .

(vii) **PUBLIC LIAISONS WAS REQUESTED TO PREVENT PRIOR 2008 "GROSSLY BAD FAITH SEARCH AND UNSUPPORTED FINDINGS FROM REPEATING ITSELF AND TO RESOLVE ANY DISPUTE OVER THE SEARCH**

12. Plaintiff filed his third FOIA request with the United States Citizenship and Immigration Service ("USCIS") requesting for agency to search for the same copy of the "change of plea and sentencing proceedings and other related information that was withheld from Plaintiff in 2003 which USCIS for some unknown and unexplainable reason was unable to locate in its own file" and relied on state documents to determine the transcripts didn't exist in Plaintiff's A-file. Thus, A public liaisons" was specifically requested to be assigned to case. The request that a public liaison be assigned to the search request was made in-accordance with section 10 of the Open Government Act of 2007, Pub. L. 110-175, 121 STAT. 2529, 2530, 5 U.S.C. § 552(k)(6)(I) of the OPEN Government Act of 2007. §552(k)(6)(I) provides that:

> FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for

> assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

Once a requester made out a valid need for a public liaisons to be assigned to his request to supervise the search, to resolve any and all issues or questions arising from the search or anything that could have delayed the production of the "state transcripts and related information in case no.: M707038) The OPEN Government Act of 2007 directed both USCIS and ICE to make their FOIA Public Liaisons available to FOIA requesters and also specifically directed that FOIA Public Liaisons are to help resolve this FOIA dispute. See 5 U.S.C. §§ 552 (a)(6)(B)(ii) & (l). For the combined reasons stated above (Sec.A). Notwithstanding the reasons in motivating factors found in (Sec. B). Because neither Defendant USCIS and ICE ever notified Plaintiff if whether request for a public liaisons was granted or denied they cannot now "*post hoc*" conveniently and dubiously claim that the state transcripts responsive to request was not found or not being withheld to Plaintiff's prejudice, for the following reasons notwithstanding above reason..

III. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED COMPLAINT

SECOND SEARCH FOR MISSING STATE TRANSCRIPTS

13. Plaintiff demonstrated that the prior search was conducted in bad faith, the grounds used for denying appeal in 2009 was unreasonable, improper and unsupported by law and facts of the request as a matter of law, entitling Plaintiff to a completely different more confined and comprehensive search designed to recover the missing records complained about. See; *Judicial Watch, Inc. v. U.S. Dep't of Commerce,* 337 F.Supp.2d 146, 156 (D.D.C.2004)("a "rigorous" second search in satisfaction of its FOIA duties") (*Citing Judicial Watch, Inc. v. Dep't of Commerce,*34 F.Supp.2d 28, 45- 46 (D.D.C.1998) (Citing *Kronberg v. U.S. Dep't of Justice,* 875

F.Supp. 861, 871 (D.D.C. 1995)(Request for Criminal Records) ("The FOIA confers upon each requester a right to a reasonable search, and when an agency search is demonstrated to be unreasonable, the FOIA requester is entitled to judgment as a matter of law and a new search.");

V. ADEQUACY OF SEARCH IS REVIEWED DE NOVO

14. A person dissatisfied with an agency's search as well as the withholding they may seek judicial review. See e.g., *LA. Times v. US. Dept of Labor,* 483 F. Supp 2d. 975 (C.D Cal. 2007) A requester may challenge an agency's response to a FOIA request in two ways. First, the requester may claim that the agency failed to make a sufficient or reasonable search of its records. Second, the requester may claim that the agency has claimed an exemption that does not apply to the records the agency has found but withheld. *Id* 483 F. Supp 2d. at 980. See Also; *Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury,* 534 F.Supp.2d 1126, 1131 (N.D.Cal.2008) The agency is under a duty to conduct a" reasonable" search for responsive records using methods that can be reasonably expected to produce the information requested to the extent they exist. The court conducts a ***de novo* review** of an agency's response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 755 (1989). The usual summary judgment standard does not extend to FOIA cases because the facts are rarely in dispute and courts generally need not resolve whether there is a genuine issue of material fact. *Minier v. Cent. Intel. Agency,* 88 F.3d 796, 800 (9th Cir. 1996). Courts instead follow a two-step inquiry when presented with a motion for summary judgment in a FOIA case. *Los Angeles Times,* 442 F.Supp.2d 880, 893 (C.D. Cal. 2006). First, courts must evaluate "whether the agency has met its burden of proving that it fully discharged its obligations under the FOIA." *Id.*

"An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was `reasonably calculated to uncover all relevant documents.'" See; *Truitt v. Dep't of State,* 897 F.2d 540, 542 (D.C. Cir. 1990)); The agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents. See: *Zemansky v. EPA,* 767 F.2d 569, 571 (9th Cir.1985) (citing *Weisberg v. U.S. Dep't of Justice,* 705 F.2d 1344, 1350-1351 (D.C.Cir.1983) Second, if the agency satisfies its initial burden, the court must determine "whether the agency has proven that the information that it did not disclose falls within one of the nine FOIA exemptions." *Los Angeles Times,* 442 F. Supp. 2d at 894. Also See: 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991) ("The burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document."); *Dobronski v. FCC,* 17 F.3d 275, 277 (9th Cir.1994). In meeting its burden, "the government may not rely upon `conclusory and generalized allegations of exemptions.'" *Church of Scientology of Cal. v. U.S. Dep't of the Army,* 611 F.2d 738, 742 (9th Cir. 1980) (quoting *Vaughn v. Rosen,*484 F.2d 820, 826 (D.C. Cir. 1973).) To date neither defendant'agencies have proved that it has met either of burdens that they released all documents Plaintiff is entitled by law or that they properly withheld the state transcripts. " *Los Angeles Times,* 442 F. Supp. 2d at 894, Citing *National Resources Defense Council,* 388 F.Supp.2d at 1095.

FREEDOM OF INFORMATION

15. The Freedom of Information Act, . §552, mandates a policy of broad disclosure of government documents when production is properly requested. See; *Church of Scientology v. Dep't of the Army,* 611 F.2d 738, 742 (9th Cir. 1979)). 552(a)(3) reads:

> ". . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

FOIA gives individuals a judicially-enforceable right of access to government agency documents. 5 U.S.C. § 552. See; Lion Raisins, Inc. v. USDA, 354 F.3d 1072, 1079 (9th Cir.2004). The FOIA opens government records to private citizens. *See* Minier v. CIA, 88 F.3d 796, 800 (9th Cir.1996). The statute "mandates a policy of broad disclosure of government documents." *Church of Scientology* 611 F.2d at 741, FOIA's "core purpose" is to inform citizens about "what their government is up to." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 775, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (citation omitted). This purpose is accomplished by "permit[ting] access to official information long shielded unnecessarily from public view and attempt[ing] to create a judicially enforceable public right to secure such information from possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), *superceded by statute on other grounds, as recognized by* Ray v. Turner, 587 F.2d 1187, 1190-91 & n. 9 (D.C.Cir.1978).

Such access, in turn, will "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989) (citation omitted). FOIA provides individuals with a "judicially-enforceable right of access to government agency documents." Lion Raisins, Inc. v. U.S. Dep't of Agric., 354 F.3d 1072, 1079 (9th Cir.2004) (citing 5 U.S.C. § 552). The primary purpose of enforcing this right of access is to "ensure an informed citizenry, [which is] vital to the functioning of a democratic society, [and] needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, (quoting NLRB v. Sears,

Roebuck & Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327(1972). Because, FOIA requires agencies of the federal government to release records to the public upon request, unless one of nine statutory exemptions applies. *See* Id *NLRB v.* ., 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b). The FOIA confers jurisdiction on the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." § 552(a)(4)(B). Under this provision, "federal jurisdiction is dependent on a showing that an agency has (1) `improperly' (2) `withheld' (3) `agency records.' *Tax Analysts,* 492 U.S. 136, 142, 109 S.Ct. 2841, 2846, 106 L.Ed.2d 112, 124 (citing "*Kissinger* v. *Reporters Committee for Freedom of Press,* 445 U. S. 136, 150 (1980). Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements. .

***Tax Analysts Summarized GTE Sylvania's* Definition of Improperly**

16. The FOIA does not define "agency record," and "[t]he legislative history is similarly unilluminating." *Tax Analysts v. United States Department of Justice,* 845 F.2d 1060, 1067 (D.C.Cir.1988, *aff'd* 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989). Although the statute fails to define the term, the Supreme Court in affirming the Court of Appeals decision in *Tax Analysts,* articulated a two-part test to determine what constitutes an "agency record" under the FOIA: "agency records" are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. See; *Tax Analysts,* 492 U.S. 136, 144-145, 109 S.Ct. 2841, 2848,

The FOIA does not define "agency record," and "[t]he legislative history is similarly unilluminating." *Tax Analysts,* 845 F.2d 1060, 1067 (D.C.Cir.1988, *aff'd* 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989).

(viii) DEFINING AGENCY RECODS

17. Although the statute fails to define the term, the Supreme Court in affirming the Court of Appeals decision in *Tax Analysts,* articulated a two-part test to determine what constitutes an "agency record" under the FOIA: "agency records" are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Tax Analysts,* 492 U.S. 136, 144-145, 109 S.Ct. 2841, 2848; The United States Supreme Court considered the question of when a document is "improperly" withheld in *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980). Recognizing that "improperly" was not defined in the statute, the Supreme Court turned to legislative history to gleam the intent of Congress. In *Tax Analysts,* the Supreme Court summarized its holding in *GTE Sylvania, Inc.* Prior to the passage of the FOIA, Congress grew concerned that employees of federal agencies had too much discretion in deciding what information to release pursuant to requests.

> In enacting FOIA, Congress intended "to curb this apparently unbridled discretion" by "clos[ing] the `loopholes which allow agencies to deny legitimate information to the public.'" (internal citations omitted). Toward this end, Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under § 552(a), "unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)." Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.... [T]he exemptions are explicitly exclusive

Tax Analysts, 492 U.S. at 150-51, 109 S.Ct. at 2851, 106 L.Ed.2d at 129. Thus, unless a withheld document falls within one of the nine enumerated exemptions, it has been improperly withheld. **It is worth remembering that it is incumbent upon the government to prove that the exemptions apply and not upon the requester to prove that they do not.** *Id.* at 142-43 n. 3, 109 S.Ct. at 2846-47 n. 3, 106 L.Ed.2d at 124 n. 3 (citations omitted). Placing the burden of

proof upon the agency puts the task of justifying the withholding on the only party able to explain it. *Id Tax Analysts* at 142-43 n. 3, 109 S.Ct. at 2846-47 n. 3, 106 L.Ed.2d at 124 n. 3 (citations omitted). Therefore "[a] court errs if it" simply approve [s] the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Id Church of Scientology* 611 F.2d at 744.

STATE TRANSCRIPTS AND RELATED INFORMATION INS ORIGINALLY OBTAINED FROM THE STATE BEFORE PLAINTIFF FILED HIS FIRST FOIA REQUEST WITH FORMER IMMIGRATION AND NATURALIZATION SERVICE

18. The Supreme Court in *United States Dept. of Justice v. Tax Analysts,* 492 U.S. 136, 142 43, 109 S.Ct. 2841, 2846-47 n. 3, 106 L.Ed.2d 112, 124 n.3 (1989) (citations omitted) Stated that in FOIA cases the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not "agency records" or have not been "improperly" "withheld." Nonetheless, case laws relied on support claims that the state court transcripts Plaintiff requested are "agency records." Documents are "agency records" if they are (1) generated or obtained by the agency, and (2) within the agency's possession through the legitimate function of official duties.

The FOIA requires disclosure only of "agency records," which are documents created or obtained by an agency and under the agency's control at the time the FOIA request is made. *See Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C.Cir.1996) ("To qualify as an "agency record" subject to FOIA disclosure rules, "the agency must `either create or obtain' the requested materials," and "the agency must be in control of [them] at the time the FOIA request is made." Citing *Tax Analysts,* 492 U.S. 136, 144, 109 S.Ct. 2841, 2848 (quoting *Forsham v. Harris,* 445 U.S. 169, 182, 100 S.Ct. 977, 985, 63 L.Ed.2d 293 (1980))"). *Tax Analysts* stated that two *Kissinger* and *Forsham,* requirements each must be satisfied for

requested materials to qualify as "agency records."

First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an `agency record' within the meaning of the FOIA."

Second the agency must be in control of the requested materials at the time the FOIA request is made. Id 492 U.S. at 144.

(x) ***Applying Tax Analysts-Forsham-Burka- Obtain Or Create Test To The State Transcripts***

19. The first prerequisite is that a requester must demonstrate that agency had either "created or obtained", the requested materials "in order to convert the requested materials into `agency record' within the meaning of the FOIA." As expressed in above statement of facts, although the sought after records was created in the State Court, nonetheless the state transcripts "were developed for it to play a key role in "agency decision making" in subsequent agency proceedings, in violation of negotiated bargain. (See above at statement of facts in sec.B), Additionally INS or ICE trial attorneys routinely use the state transcripts to prove an aliens deportability based upon reasonable, substantial, and probative evidence under 8 USC § 1229a(3)(B)(iv) Secondly, and most importantly the record was obtained from the state before it destroyed its own copy and Plaintiff filed his first FOIA request (again see above Secs. B(i, ii, iii) INS was required to have possessed the records when it processed his request and withheld them from Plaintiff.

(xi) ***TAX ANALYSTS- BURKA CONTROL TEST***

20. Nothwithstanding section A, ¶ 6, page 3 the state transcripts became agency records when INS decided to use the judgment advserely against him. *Tax Analysts* 492 U.S. at 144 and *Burka,* first *control* prong, elaborated by control the court meant "that the materials have come into the agency's possession in the legitimate conduct of its official duties. The *Tax Analysts*

test, the D.C circuit identified four factors relevant to a determination of whether an agency exercises sufficient control over a document to render it an "agency record": "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Tax Analysts* 845 F.2d at 1069 (citation omitted), *aff'd on other grounds,* 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112.

1. INS was required by law to have relinquished control over the records in agency proceedings when plaintiff requested his own copy of the transcripts in his FOIA request in agency proceedings allowing Plaintiff to carry his burden of proof.

2. Once Plaintiff filed his first FOIA request and agency located the sough after record, INS personal was required to have read the documents when it was originally withheld before it applied the FOIA exemption under 6 C.F.R. § 5.11 (7), comparing the record to the description of the request letter to make certain that it was in fact the requested materials

3. 6 C.F.R. § 5.10 and General Records Schedule to instructed agency preserve the request and denial dating back to 2003 to the 2009 FOIA request) where agency lost any and all discretion to dispose of the record at INS discretion, making them "agency records" under FOIA. (see supplemental appeal at ¶ 11 page 3 footnote 1.);

Attached hereto is the three page request letter labeled re-consider request to expedite dated March 03, 2013 at page 3 Agency Records, and Attached hereto is the four (4) page letter labeled "Supplemental To Freedom of Information Act Appeal Re: 2013FOIA9921" page 3-4 at Section II The records Were "Created or Obtained" by ICE ¶¶ 9—10 n.1, 11. The four (custody and control, obtained or create) factors described in *Tax Analysts,* 492 U.S. at 145, 109 S.Ct. 2841 and *Burka,* for example Burka, 87 F.3d at 515; *Cf*; *Bureau of Nat. Affairs v. US Dept. of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) ("*Bureau*"), elaborated that: "In certain contexts, such as where a document is created by one agency and transferred to a second agency, control or possession is

the critical analysis. See; Id *Bureau* 742 F.2d 1490." Agency is not permitted to have altered its disposal regulations to avoid the FOIA reach. See Id *Bureau* 742 F.2d at 1493 "

(XI). CONSTRUCTIVE EXHAUSTION OF ALL ADMINISTRATIVE REMEDIES WITH ICE AND CONTRAVERSEY OF FOIA REQUEST

21. Plaintiff maintains that he *constructively exhausted* his administrative remedies with agency because ICE failed to respond to referral within applicable time constraints when complaint was mailed (See Compl. ¶¶ 34—40s and ¶ 44). Once an agency responds to a request belatedly but before suit is filed, actual exhaustion must still be pursued before going to court.See; *Oglesby* v, *u.s. Dep't of Army.* 920 F.2d 57, 62-63 (D.C.Cir. 1990)("an administrative appeal is mandatory if the agency cures its failure to") .

On Jan 28, 2013, Plaintiff did in fact pursue his pursue his appellate process with ICE by filing his appeal with ICE , after it brelatedy responded advserly to referral, and on March 18,2013, Grace Cheng, Chief Government Information Law Division, ICE Office of the Principal Legal Advisor of the Department of Homeland Security **closed** Plaintiff's appellate processs because FOIA complaint was filed in this case. The *Oglesby* 920 F.2d at 61 stated that:

> Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision. *See McKart v. United States,* 395 U.S. 185, 194, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969). The exhaustion requirement also allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review. *See id.* However, absent a statutory provision to the contrary, failure to exhaust is by no means an automatic bar to judicial review; courts usually look at the purposes of exhaustion and the particular administrative scheme in deciding whether they will hear a case or return it to the agency for further processing. *See id.* at 193

To date, the records have not been received although Plaintiff has filed appeals with both agencies. Plaintiff has exhausted his administrative remedies to obtain his records with USCIS

and ICE administratively closed his appellate file. To date, ICE has not reopened his case nor has it disclosed his own "copy of the state change of plea transcripts and related information or disclosed the 25 pages it withheld in 2003 nor **received any of the 79 pages** ICE **withhled "in full" or more without claiming exceptions** ICE appellate body decision to close appeal "illuninates ICE's unwillingness to correct its own mistakes" since Plaintiff electronically filed his one page notice that he was pursuing agencies appellate process on March 17, 2013 (labeled: "NOTICE OF INTENT OF.: (SIC) **PURUSING APPEAL; STATUS OF: PENDING APPEAL: PENDING REQUEST TO: EXPEDITE**) and **URGENT** was written in red. The controversey over agency refusing to release the state change of plea transcripts and related information continues to be unresolved. See: *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 689 (9th Cir. 2011) ([a] suit under the FOIA can be rendered moot by events subsequent to its filing. . . to moot a FOIA claim, however, the agency's production must give the plaintiff everything to which he is entitled. Otherwise, there remains some "effective relief" that can be provided the plaintiff, and the case is not moot.") *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir.2009).(citation omitted). A FOIA claim is not moot, for example, if the agency produces what it maintains is all the responsive documents, but the plaintiff challenges "whether the [agency's] search for records was adequate." *Quoting* U.S.C. § 552(a)(3)(C)-(D) (requiring agencies to conduct a search reasonably calculated to uncover all records responsive to the request). In that situation, there is still a live controversy regarding whether the agency is withholding records. See; *Id Yonemoto* 686 F.3d at 689

(xii) The Burden Is On Agency Withholding The Documents And Segregability

22. The Freedom of Information Act (FOIA) obligates federal governmental agencies, upon request from any person, to disclose to that person all documents responsive to the request that

are within the agency's possession, custody or control. See: *Nat'l Resources Def. Council,* 388 F.Supp.2d at 1094. An agency may withhold a requested document "only if the material at issue falls within one of the nine statutory exemptions found in [5 U.S.C.] § 552(b)." *Maricopa Audubon Soc'y.,* 108 F.3d at 1085. **It is worth remembering that it is incumbent upon the government to prove that the exemptions apply and not upon the requester to prove that they do not**. *Id.* at 142-43 n. 3, 109 S.Ct. at 2846-47 n. 3, 106 L.Ed.2d at 124 n. 3 (citations omitted). Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. *Id Tax Analysts* at 142-43 n. 3, 109 S.Ct. at 2846-47 n. 3, 106 L.Ed.2d at 124 n. 3 (citations omitted). Therefore "[a] court errs if it" simply approve [s] the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Id Church of Scientology* 611 F.2d at 744.

23. It would be error for the district court to simply approve without question any claim made by either defendant USCIS agency that the change of plea and sentencing proceedings and notes, memos, names of the district counsel that was contacted for those proceedings that form part of the 21 pages and or the approx 90 pages ICE withheld in full without claiming any exemptions claiming that no reasonably segregrable portion(s) of non-exempt information exist. Particularly where petitioner requested in his appeal that reasonably segregable portion of a responsive records must have been be provided to plaintiff after redaction of all exempted material, as the law required 5 U.S.C. § 552(b). Plaintiff seeks this court to reasonably segregate portions of a responsive records from all exempted material and release those portions which do not fall within (b)(5): 552a(k)(2); 552(a)(b)(6); (b)(7)(c) or (b)(5) or even under (k)(2); (b)(7)(e). Plaintiff additionally attaches hereto his eight page ***VAUGHN V. ROSEN MOTION,*** along with supplement of FOIA appeal he filed with ICE

VI. INDEPENDENT PATTERN AND PRACTICE CLAIM

24. Both Defendants are violating their own regulations in procesing referrals creating a pattern or practice of 'uneasonably and "improperly" preventing or delying processing referrals referred to ICE while other FOIA requesters that are able to directly file request with ICE are immediatelty placed in the tracking system and processed as of the date when ICE initially received the request. Under title 6 part 5 of CFR Rule 5.1(a)(1) a component of the Department of Homeland Security ("Department or DHS) should read 6 CFR 5 *et seq*., in harmony with 5 U.S.C § 552 *et seq*, when processing all FOIA request. For purposes of determining if whether referrals are being processed on the first-in, first-out. 6 CFR § 5.4(g) requires that referrals be forwarded to the agency which the documents originated or had subject matter interest (in this case ICE) within ten working days from when USCIS first received the request "and not at a later date. Id.

25. FOIA, requires that upon receipt of a request which includes referrals, departments was required to have assigned an individual tracking number to referral that will take longer than 10 days to process § 552(a)(7)(A). ICE had twenty working days to respond to requests pursuant to 5 U.S.C § 552(a)(6)(A)(i), plus a ten working day extension may be extended by written notice setting forth "unusual circumstance" to warrant extension pursuant to § 552(a)(6)(B).

The 20 day working day period for ICE to have issued an acknowledgment letter and assigned plaintiff his individual tracking number, commenced on May 21, 2012, when request letter was dated and electronically submitted or on June 07, 2012 when USCIS' mailed its acknowledgement letter with required individual tracking number NRC2012052309. See; 5 U.S.C § 552(a)(6)(A). ICE never sent an acknowledgement letter nor assigned individual tracking number within the 20day work deadline. Fact of the matter the requisite

acknowledgment letter and individual tracking number was not sent out until approx. eight (8) months later when request had akready been processed on January 18, 2013 and only after persistent and constant phone and email contacts and formal electronically filed request with ICE. Plaintiff may bring a separate and independent claim alleging "a pattern and practice of unreasonable delay in responding to FOIA request" under Hajro v. USCIS, 832 F.Supp.2d 1095, 1105, 1107 (Dist. Court, ND Cal 2012), injunctive relief is warranted in order to remedy a pattern and practice of FOIA violations by an agency where there is "a probability that alleged illegal conduct will recur in the future." In deciding whether to grant an injunction, the court must consider the effect on the public of disclosure or nondisclosure, the good faith of any intent to comply expressed by the agency, and the character of past violations. .

26. Agencies cannot simply refer documents to other agencies as a matter of course but must show that the procedure is reasonable under the circumstances. See: *Sussman v. U.S. Marshals Service,* 494 F.3d 1106, 1118 (D.C. Cir. 2007) (*Citing* McGehee v. CIA, 697 F.2d 1095, 1110 (D.C.Cir. 1983) (*Mc Gehee* described the test for when referrals result in improper withholding). Holding that;

> In particular, FOIA explicitly permits "consultation . . . with another agency having a substantial interest in the determination of the request," 5 U.S.C. § 552(a)(6)(B)(iii)(III), and if an agency chooses outright referral instead, "the advantages that would be secured by delegating *all* responsibility for reviewing the document . . . rather than engaging in . . . `consultation' . . . must then be balanced against any inconvenience to the requester caused by the referral," *McGehee,* 697 F.2d at 1111 n. 71

27. Applying the *McGehee test* in this case where the USCIS referred materials to the ICE for final disposition rather than releasing them or citing exemptions directly amounts to improper withholding. *See;* Peralta v. U.S. Attorney's Ofice, 69 F.Supp. 2d. 21, 28 (D.C.Cir.1998). The D.C. Cir in *Peralta* elaborated that:

> "when an agency receives a FOIA request for `agency records,' in its possession, it must take responsibility for processing the request." *McGehee*, 697 F.2d at 1110. The mere fact that another agency created the documents cannot excuse the possessing agency from its responsibility to the person or party seeking information. *Id.; see also Paisley v. CIA*, 712 F.2d 686, 691 (D.C.Cir.1983). . The statute disfavors any attempt by an agency "to shirk [its] responsibilities to respond promptly and fully to requests for records." *McGehee*, 697 F.2d at 1101 n. 18 (citation omitted). "A referral constitutes a "withholding" and held that if the "net effect" of an agency's handling of a FOIA request "is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them," then the response constitutes a "withholding." (Citations Omitted). The Court should treat the withholding as "improper" "unless the agency can offer a reasonable explanation for its procedure." For instance, the procedure will be deemed "reasonable" if it "significantly improves the quality of the process whereby the government determines whether all or portions of responsive documents are exempt from disclosure."

28. The proper test to determine whether referral's amounted to improper withholding is found in *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C.Cir. 1983) described a test for when referrals result in improper withholding. In particular, FOIA explicitly permits "consultation . . . with another agency having a substantial interest in the determination of the request," 5 U.S.C. § 552(a)(6)(B)(iii)(III), and if an agency chooses outright referral instead, "the advantages that would be secured by delegating *all* responsibility for reviewing the document . . . rather than engaging in . . . `consultation' . . . must then be balanced against any inconvenience to the requester caused by the referral," *McGehee*, 697 F.2d at 1111 n. 71.

29. Chief *Callahan's* FOIA and PA officer issued a Memorandum to DHS components instructing them to adhere to Office of Information Policy (OIP); The Department's policies and procedures regarding the OIP Guidance, which are to be interpreted in conjunction with the Department's interim final FOIA regulations at 6 CFR Chapter 1 and Part 5, are intended to foster efficiency and ensure a consistent approach in dealing with referrals and consultations in conjunction with DHS regulations. http://www.justice.gov/oip/foiapostl20llfoiapost42.html

30. Plaintiff maintains that 'consultation's' would have been the speediest and practicable solution under 5 U.S.C. § 552(a)(6)(B)(iii) (1976), § 552(a)(6)(B)(iii) (1976), consultation, not referral to the originating body, is the *only* procedure expressly set forth in the Act that might be used to deal with situations like this one. Since USCIS's processing agency, the withholding exemptions provisions agency placed on the records responsive to request (ie., the state change of plea transcripts and related information) would not fall under the same exemptions 10 years later after the threat has long faded and disappeared if they were present in the first place.

31. To date USCIS has not shown why it referred the copy of the state transcripts and other documents to ICE. The Court should treat USCIS request requirements and referral program as a delay program a form of pattern and practice of withholding as "improper" because to date neither defendants have not supplied any explanation on their requesting procedure and why they didn't consult with ICE of whether to release the "copy of the state transcripts and related information (contained in the 25 pages that INS withheld from him in 2003 or release them in this 2012 request where 2003 exemptions definitely do not apply in 2012, consultation with ICE was the *only* practicable and speediest procedure expressly set forth in the Act that might have been used to deal with situations like plaintiffs since Plaintiff originallly request a copy of the state transcripts and related information back in 2003 which agency found but withheld.

VII. SCOPE OF REVIEW UNDER 5 U.S.C. § 706(2)(A) IS TO REVIEW THE ENTIRE RECORD OF AGENCY PROCEEDINGS TO DETERMINE THAT THE DEPORT ATION ORDER WAS "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW "

32. This court has power to review agencies "order of deportation in full view of plaintiff's requested state change of plea and sentencing proceedings and declare it void" where there is **no** other adequate remedy in a court under § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial

review".) Are causes prescribed by § 704 that arise from administrative proceedings which is "wholly statutory, and this judgment is not unreviewable, unless agency themselves shows that, it is expressly so declared unreviewable by statute. *See; Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967)("5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation") (Citing) *Shaugnessy v. Pedeiro,* 349 U.S. 48, 50-52. (1955) ("The provision of § 242(b) of the Immigration and Nationality Act of 1952 which makes deportation orders of the Attorney General "final" does not "expressly" supersede or modify the provisions of the Administrative Procedure Act within the meaning of § 12 thereof, and does not make § 10 of the latter Act inapplicable to deportation proceedings."). Plaintiff seeks judicial review of the agency's final decision to deport plaintiff which agency refused to review order in full view of state transcripts. *See Matter of Dany Rojas-Vega.*, A#14-649-662(2004) ("regardless what the state record contained the conviction will not be ignored"), (Unpublished decision); The board's duty was not only not to ignore the conviction but address the claims and prepare that finding for appellate review not ignore it.

33. Thus, for this reason, plaintiff requests the Court to review deportation Order and declare it void because upon review of the administrative trial transcripts and pleadings filed to his [removal proceedings in this case makes clear that plaintiff was not given a full and fair hearing with a reasonable opportunity to obtain nor present evidence on his behalf. Federal court must set aside an agency's action where it failed to consider mandatory factors set forth by statute or in a regulation.

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Cerrillo–Perez v. INS, 809 F.2d 1419, 1422 (9th Cir.1987)(" There the Ninth Circuit held; " The BIA is required to consider all relevant factors . . . discretion can be properly exercised only if the circumstances are actually considered." (citations). Accordingly, "[w]hen important aspects of the individual claim are distorted or disregarded," the BIA has abused its discretion.) "); see also NRDC v. EPA, 526 F.3d 591, 602 (9th Cir.2008) ("An agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' " (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U .S. 29, 43 (1983)));

34. Plaintiff contends that the IJ could not have thoughtfully exercised any discretion, or been bound by or applied the law regarding plaintiffs claims without granting plaintiff's motion to subpoena for his change of plea and sentencing proceedings that was in INS custody and control at that time of proceedings. Both the 8 U.S.C. § 1229a(c)(1) and INA §240(c)(1) provides that "at the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing." Therefore, it was imperative that Plaintiff had access to all documents and files at the beginning of proceedings for which proceedings were initiated which would have then become part of the record. Specifically the state transcripts containing the October 06, 1995 plea bargain, because of once the judgment became final the judgment and plea bargain became inseparable as matter of law. *See:*. Above § **A** page 3.

35. The Immigration Judge refused to intelligently deal with plaintiff's substantive breach of promise claims and fully develop the record for appellate review and because the BIA ignored the did not issue a subpoena and callously disregarded the law when stated that "regardless what the state record contained the conviction will not be ignored" the record was intientionally not devolped for appellate review at the Ninth Circuit. *See; Rojas-Vega v. Alberto Gonzalez.,* 04-

73878; 154. Fed. Appx 25, 2005WL, 3037453 (9th Cir. 11/14/05) (Petition for Review) where the Ninth Circuit did not consider Plaintiff's contentions because it.

36. Both the IJ's and the BIA flat out and adamant refusals to issue a subpoena upon INS compelling agency to produce the state transcripts in possession preventing plainitff from supporting his claims, clearly plaintiff was prejudiced greatly by the complete claim of the state transcripts which agency possessed.

37. Plaintiff was denied due process because he was prevented from obtaining and presenting evidence on his behalf in deportation proceedigs. The Fifth Amendment guarantees due process in deportation proceedings. *See* Colmenar v. INS, 210 F.3d 967, 972 (9th Cir.2000) (quoting Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir.1999).,

38. As a result, an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. *See id;* 8 U.S.C. § 1229a(b)(4). In addition, aliens in deportation proceedings are entitled by statute and regulation to certain procedural protections. Barraza Rivera v. INS, 913 F.2d 1443, 1447 (9th Cir.1990); Baires v. INS, 856 F.2d 89, 91 (9th Cir.1988). For example, an alien must be afforded a reasonable opportunity to present evidence on his behalf. INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 240.10(4) (2001); *see also* INA § 240(b)(1); 8 U.S.C. § 1229a(b)(1) (providing that the immigration judge must receive evidence); 8 C.F.R. § 240.1(c) (2001) (same). If an alien is prejudiced by a denial of any of the applicable procedural protections, he is denied his constitutional guarantee of due process. Campos-Sanchez, 164 F.3d at 450

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PLAINTIFF WAS DENIED DUE PROCESS OF LAW BECAUSE WHEN AGENCY INITIATED DEPORTATION PROCEEDINGS SOLELY BASED ON THE 1995 CONVICTION IT BORE UPON ITSELF THE RESPONSIBILITY OF PROVIDING PLAINTIFF WITH A REAL OPPORTUNINTY TO OBTAIN AND PRESENT EVIDENCE ON HIS BEHALF

39. When a Plaintiff sufficiently sets-forth specific facts to support claims that an agency has acted arbitrarily, capriciously, abused it's discretion or did not follow the law under the Administrative Procedure Act 5 U.S.C. § 706. The scope of the Courts review is to review the entire record to determine that the deportation order was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law". See e.g., Virgil v. Leavitt, 381 F. 3d 826, 833 (9th Cir. 2004), Where the Ninth Circuit applied;

> "The familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and ask whether the Agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Even when an agency explains its decision with "less than ideal clarity," a reviewing court will not upset the decision on that account "if the agency's path may reasonably be discerned." (citations omitted) [c]ourts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.... Nevertheless, we may not substitute [our] judgment for that of the agency.... *id* 381 F. 3d 833,

40. Plaintiff is not requesting for this court to upset a sound judgment but to declare null and void an extremely unsound agency judgment ("that seriously offends the law and public policy"), But here agency held agency proceedings so fundamentally unfair that it can legally be said that no real or legal proceedings was ever held.

40. Where once plaintiff raised his breach of promise claims the deck of cards was stacked against him because under both §240(c)(2) and § 1229a(c)(2), the alien bears a burden of carrying the proof in the conext of the relief sought, Plaintiff had the statutory right to access his

file for the purpose of proving either that he had been lawfully admitted to the country, or that he was admissible. This section provides that:

> "[i]n meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States."

8 U.S.C. § 1229, which provides that an "'alien shall have access' to his entry document" and other similar records "'not considered by the Attorney General to be confidential'" in order to "meet his burden of proof in removal proceedings," is a "mandatory access law [that] entitl[ing] [plaintiff] to his A-file." Agency was required to have furnished Plaintiff with his own copy of the state trasncripts allowing him to carry his burden of proof. But it didn't.

43. In addition the the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." See; §240(c)(3)(A) and § 1229a(c)(3)(A),

> 8 USC § 1229a(3) provides that; "In the proceeding the Service has the burden of establishing by clear and convincing evidence that, .. the alien is deportable. .; Sub paragraph (3)(B) provides that; "In any proceeding .. the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:" (3)(B)(iv) provides that: "**iv)** Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction."

44. INS/ICE trial attorneys routinely use the state transcripts that contain the rendition of judgment to prove that Plainitff suffered a conviction thus, ensuring that Plaintiff's deportability supports the allegations found in the "Notice to Appear" (NTA). See: §240(c)(3)(B)(iv) and § 1229a(c)(3)(B)(iv), they provide that;

> (iv) **Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.**

The court minutes, amended complaint or even the abstract of judgment was not reasonable,

substantial, or probative evidence, that alone was just an excuse to improperly open his A-file and unlawfully use evidence of Plaintiff's prior convictions insulated by his 212(c) waiver grant from deportation. See again *Rojas-Vega v. Alberto Gonzalez.,* 04-73878; 154. Fed. Appx 25, 2005WL, 3037453 (9th Cir. 11/14/05) ("*(Citing) Molina-Amezcua* v. *INS,* 6 F.3d 646,648 (9th Cir. 1993) (per curiam) ("When the alien suffers another conviction ... the Attorney General must make a new decision whether to deport in light of the new information."), because once Plaintiff interposed his *breach of plea bargain* claims,

45. INS had a double heavy burden to prove both deportability and that it was not bound by the promise it made to plaintiff that induced his guilty plea otherwise it was required to have respected the plea bargain as it stood when Plaintiff first raised the breach of promise, particulary where the U.S. Attorney General *Janet Reno*, ("AG") published AG Order No.2055-96 in the federal register establishing the law in Plaintiff's case. See; 8. CFR § 103.37(g)

> 8 CFR § 103.37(g) provides in important part that the; "[d]ecisions of the Attorney General, shall be binding on all officers and employees of the DH or immigration judges in the administration of the immigration laws of the United States.

See Also; 8 CFR § 3.1(g), was the governing law of the A'G's decision in Sept 1996 when the AG established the law regarding plea bargains. Once **the AG not only chose to not correct any errors of "fact or law" in the underlying plea bargain** but she also chose not to amend the regulation. (See: above section A, ¶ 6 page 3)

46. ICE was required to have respected the plea bargain or otherwise have refuted the binding effect the plea bargain had on agency on the record. Because the judgment and the plea bargin is inseparable. Plainitff seeks for his deportations order be found unlawful, voided and set-aside, as an remedy but as a deterrent to prevent a reoccurance by agency from evading performance and keeping Plaintiff remediless. See; decision in *Thomas v. Immigration & Naturalization Service,*

35 F.3d 1332, (9th Cir. 1994), *Thomas* successfully argued that the government violated the agreement pursuant to which he waived his constitutional right to remain silent and provided the government with information and testimony. *Thomas* rightly claimed that this violation breached his constitutional right to due process of law citin (Citing *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971),

47. The applicable statutes and agency regulations governing removal proceedings did permit the Immigration Judge to ignore the breach of promise claims by not compeling agency to produce the state transcripts. See; Cerrillo–Perez. 809 F.2d at 1422. The Cerrillo–Perez panel further ruled " we "set aside an agency action if [we] find that [t]he agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under, any [governing] so+urce[] of law." *A Restatement of Scope-of-Review Doctrine,* 38 Ad. L.Rev. 235, 235 (1986) (§ (b)(2)). Where an agency is required by statute "to `consider' a factor, the agency must reach `an *"express and considered conclusion"* about the bearing of (the factor).'" (citations and quotations omitted) (emphasis added) . Moreover, "a litigant may [properly] contend that the applicable statute does not permit the administrator ... to refuse to consider a possibly relevant factor." *Regulatory Procedures Act of 1981: Hearings on H.R. 746 Before the Subcomm. on Administrative Law and Gov'tal Relations of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 953 (1981) (memorandum prepared for ABA Coordinating Group on Regulatory Reform).

48. INS trial attorney's complete and utter silence now works against agency because his claims was significant enough to over-step materality in his removal proceedings as well as at the BIA. See; Cerrillo–Perez. 809 F.2d at 1422, The Ninth Circucit had that; Where a possibly relevant factor is "significant enough to step over a threshold requirement of materiality[,] ... any

lack of agency response or consideration becomes of concern." (citations omitted); *see also* Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report,* 38 Ad.L.Rev. 239, 263 (1986) (Agency "action should be held arbitrary more readily if the agency does not respond to comments made by participants in the proceeding."). This agency action warrants to be held arbitrary since INS not only sat mute to all Plaintiff's substantive breach of promise claims, did not respond to his subpoena in proceedingsw and at the BIA .

COUNT 1
Both Defendants Are Barred From Post Hoc Claiming Any Adverse Determinations Described In 8 C.F.R. § 103.10 (b) (3) and 6 C.F.R. § 5.6 (c) That Was Not Originally Claimed At The Conclusion Of Its Search

Plaintiff re alleges paragraphs and subparagraph 8 through 14 and pages 4—10 as if fully first asserted herein. Defendant USCIS, through their officers and agents, have found Plaintiff's state transcripts and related information in state case no.: M707038 occuring at the San Diego Superior Court and improperly on October 6, 199. Because both defendant's did not respond to a request for a FOIA Public Liaisons be assigned to his search request they cannot now *post hoc* claim that the state transcripts was not found. The OPEN Government Act of 2007 specifically directed both USCIS and ICE to make their FOIA Public Liaisons available to FOIA requesters and also specifically directed that FOIA Public Liaisons are to help resolve this FOIA dispute.

INDEPENDENT COUNT 2
USCIS HAVE CREATED A PATTERN OR PRACTICE OF VIOLATING 6 CFR § 5.4(g)

Plaintiff re alleges paragraphs and subparagraph 20--30 pages 20—23 as if fully first asserted herein. Defendant USCIS, through their officers and agents, have improperly created a pattern or practice of violating 6 CFR § 5.4(g) time fixed of ten (10) day time period to forward referrals to ICE once it determined that no consulations was not viable this pattern or practice achives the

"net effect" "is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them," in violation 6 CFR § 5.4(g)

INDEPENDENT COUNT 3

ICE HAS CREATED A PATTERN OR PRACTICE OF VIOLATING 6 CFR § 5.6(a), CFR § 5.6(b) AND 5 U.S.C § 552(a)(7)(A) AND 5 U.S.C § 552(a)(6)(A)(i),

Plaintiff re alleges paragraphs and subparagraph 24 pages 20-23 as if fully first asserted herein. Defendant ICE, through their officers and agents, have improperly a fashioned a pattern or practice between them by exploiting the fact that USCIS has built a pattern or practice of unnecessarily referring documents to ICE violating Rule 5.4(g) long after the time fixed of ten (10) day time period to refer documents to another agency, while ICE themsleves are violating 6 CFR § 5.6(b) the mandatory 20 business days response time § 552(a)(6)(A)(i), by disregarding the referrals that USCIS has referred to them by sending mandatory ackowledgement letter with tracking number for request that take longer than ten day period to respond under Rule 5.6(a) § 552(a)(7)(A).

COUNT 4

INS/ICE VIOLATED ITS OWN STATUTES AND REGULATIONS VIOLATING THE ADMINISTRATIVE PROCEDURE ACT 5 U.S.C. § 706.

Plaintiff re alleges paragraphs and subparagraphs 32--48 pages 23--31 as if fully first assertedherein. Defendant ICE, through their officers and agents, held agencies administrative (deportation) proceedings so fundamentally unfair as matter of "fact and law"that it could be said that no proceedings was ever had which has kep plaintiff remediless in violation of due process and the Administrative Procedure Act of 5 U.S.C. §§ 701-706.

COUNT 5

Violating Exemption (k)(2) of the Privacy Act and Exemptions (b)(5). (b)(6).(b)(7)(C) and (b)(7)(E)

Plaintiff re alleges paragraphs and subparagraphs 22--23 and pages 18-19 as if fully first asserted herein.

Both defendant ICE and USCIS, through their officers and agents, have not carried their burden to demonstrate that it did not improperly withhold records subject the disclosure under FOIA. 5 U.S.C. § 552(a)(4)(B) U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for this Court to enter an ORDER:

(1) Granting jurisdiction over this action under 5 U.S.C. 552(a)(4)(B)

(2) Issuing a Summons and Complaint upon agency Pursuant to FRCP Rule 4(c)(2)

(3) Ordering both agency Defendants to draft a Vaughn Index under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir 1973), within thirty days after the court issues summons on Defendants

(4) Enjoining agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." § 552 (a)(4)(B),

(5) Find that agency has improperly withheld agency record under §552 and.§ 706(1)

(6) Hold unlawful and set aside agency action under 5 U.S.C.§706(2)(A)—(D)

(7) Review Deportation order and declare it void 5 U.S.C.§706(2)(A)—(D)

(8) Award Plaintiff actual damages under 5 U.S.C. § 552a(g)(4)(A), the exact amount of which is to be determined at trial but is not less than $1,000;

(9) Plaintiff reserves the right to raise other issues and request other forms of relief consistent with this actions

(10) Grant such other and further relief as may deem just and proper

DATED: Friday 12th of July of 2013

Respectfully Submitted

Dany Rojas-Vega
Appearing ***Pro-Se***

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. 28 U.S.C. §1746(1)

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Dany Rojas-Vega

Plaintiff,

V.

United States Citizenship Immigration Service; Department of Homeland Security; Immigration Customs Enforcement; John Morton

Defendant.

Civil Action No. 13cv172-LAB(BGS)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

that because Plaintiff has failed to show that venue is proper in response to the Order to Show Cause, this action is DISMISSED WITHOUT PREJUDICE to its being refiled in a forum where venue is proper. Case is closed.....

Date: 7/5/13

CLERK OF COURT
W. SAMUEL HAMRICK, JR.
By: s/ J. Haslam
J. Haslam, Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANY ROJAS-VEGA,

Plaintiff,

vs.

UNITED STATES CITIZENSHIP IMMIGRATION SERVICE, DEPARTMENT OF HOMELAND SECURITY, AND IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants.

CASE NO. 13-CV-172-LAB (BGS)

ORDER OF DISMISSAL

Plaintiff Dany Rojas-Vega, proceeding *pro se*, filed this action to appeal denial of his Freedom of Information Act (FOIA) request for certain immigration-related documents. He sought leave to proceed *in forma pauperis* (IFP). The Court issued an order granting his request to proceed IFP, and also requiring him to show cause why this action should not be dismissed for improper venue. (Docket no. 6.) The Order to Show Cause ("OSC") noted that, under FOIA, venue is proper in the district in which the plaintiff resides, the district where the records are maintained, or the District of Columbia. *See Arevalo-Franco v. U.S. I.N.S.*, 889 F.2d 589, 591 (5th Cir. 1989); 5 U.S.C.§ 552(a)(4)(B). Rojas-Vega used to reside in this District, but now resides in Costa Rica, so venue is only proper in this District if the records he seeks are maintained here. The OSC noted that proper venue is particularly important in this case, because as a plaintiff proceeding IFP, he is

/ / /

entitled to have the U.S. Marshals serve Defendants with process, and serving parties in distant locations involves needless difficulty and strains public resources, if it is even possible.

Rojas-Vega has filed his response to the order to show cause. (Docket no. 8.) The first part of the response is devoted to the merits of his request and to jurisdiction. The response contains bare allegations that the records he seeks are maintained in this District. (Response at 2:25–27, 5:20–21.) But it then goes on to allege that the records are in the custody of USCIS, CBP, and ICE. (*Id.* at 2:28–3:2.) It also identifies certain correspondence, which is attached as exhibits to the response. After discussing the correspondence, the response concludes by alleging that the records were located in this District when Rojas-Vegas was a resident here. (*Id.* at 5:14–16.)

It is apparent Rojas-Vega misconstrues the meaning of what it means for agency records to be situated in a judicial district. The attached correspondence identifies the documents Rojas-Vega seeks as having originally been created in connection with criminal proceedings in California state court within this district (*see* Docket no. 8 at 13), and it is possible the state court or some other state agency might have duplicates of the records Rojas-Vega seeks. But this suit involves a FOIA request to ICE. A FOIA request can only properly be used to obtain a federal agency's records, *i.e.*, materials that have come into the agency's possession through legitimate conduct of its official duties. *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Agency records are materials the agency itself (here, ICE) either created or obtained, and has in its control at the time the FOIA request is made. *Id.* at 144–45. FOIA does not require ICE to obtain documents held by a state court or any arm of the state of California. Thus, even if a state court or agency is keeping copies of the documents in this District, and even if those documents contain the same information that is in ICE's own records, the documents held by the state are not ICE's "agency records" for purposes of FOIA.

The correspondence shows the agencies are located in Washington, D.C., and that the records are located either there (Docket no. 8 at 17), or at the National Records Center in Lee's Summit, Missouri. (*See id.* at 15 (letter of November 28, 2012 stating that the National Records Center had located documents potentially responsive to Rojas-Vega's FOIA request and sent them to the ICE FOIA office in Washington, D.C.).) None of the correspondence suggests that any Defendant is keeping these documents in this District. What is clear is that, although the documents

Rojas-Vega seeks have some historical connection to this District, Defendants are not maintaining those documents in this District.

Because Rojas-Vega has failed to show that venue is proper in response to the OSC, this action is **DISMISSED WITHOUT PREJUDICE** to its being refiled in a forum where venue is proper.

IT IS SO ORDERED.

DATED: July 3, 2013

HONORABLE LARRY ALAN BURNS
United States District Judge

U.S. Department of Homeland Security
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

U.S. Immigration and Customs Enforcement

January 18, 2013

Dany Alberto Rojas Vega
100 Metros al Sur-y 75 Metros al Oeste
Del Marisco Bar
Cocal Punarenas, Costa Rica

Re: ICE FOIA Case # 2013FOIA9921
USCIS FOIA Case # NRC2012052309

Dear Mr. Rojas Vega:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Citizenship and Immigration Services (USCIS), dated May 20, 2012. You are seeking all immigration records pertaining to Dany Alberto Rojas Vega.

A search of USCIS for records responsive to your request produced 379 pages of documents that originated from U.S. Immigration and Customs Enforcement (ICE). USCIS referred these documents to ICE for review and processing under the FOIA.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual[1] unless the agency has exempted the system of records from the access provisions of the Privacy Act.[2]

After a review of the records referred by USCIS, I determined that portions of the documents will be withheld pursuant to Exemption (k)(2) of the Privacy Act and Exemptions (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E) of the FOIA.

Privacy Act Exemption (k)(2) exempts from mandatory disclosure investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence.

FOIA Exemption 5 ICE has applied Exemption 5 to protect from disclosure intra-agency documents that contain the recommendations, opinions, and conclusions of agency employees. The disclosure of candid opinions and inhibit the free and frank exchange of information and opinions among agency personnel on important agency decision-making by having a chilling effect on the agency's deliberative process

[1] 5 U.S.C. § 552a(d)(1).
[2] 5 U.S.C. §§ 552a(d)(5), (j), and (k).

USCIS DENYING REQUEST

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I have determined that the responsive documents qualify for protection under the deliberative process privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement official names and third-party information contained within the documents.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

ICE has applied FOIA Exemption 7(E) to protect from FBI IDs and law enforcement system checks contained within the documents.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. I have determined that disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

You have the right to appeal ICE's withholding determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Office, 500 12th Street, S.W., Stop 5009 Washington, D.C. 20536-5009, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the $14 minimum, there is no charge.[3]

If you need to contact our office about this matter, please refer to case number **2013FOIA9921**. This office can be reached at (866) 633-1182.

Sincerely,

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure: Three hundred seventy-nine (379) Pages

[3] 6 CFR § 5.11(d)(4).

U.S. Department of Homeland Security
500 12th ST SW; STOP 5009
Washington, DC 20536-5009

U.S. Immigration and Customs Enforcement

March 18, 2013

Dany Rojas-Vega
100 Metros al Sur-Y 60 Metros al Oeste
De La discoteca el-Priviligo
Cocal-Puntarenas, Costa Rica

RE: OPLA13-722; 2013FOIA9921

Dear Mr. Rojas-Vegas:

This is in response to your letter dated January 28, 2013 appealing U.S. Immigration & Customs Enforcement's (ICE) initial determination in your Freedom of Information Act/Privacy Act (FOIA/PA) request. Your FOIA/PA request asked sought records seeking records regarding yourself.

This FOIA request is currently the subject of litigation in Rojas-Vegas v. U.S. Citizenship and Immigration Services, Department of Homeland Security, et al., Case No. 13 Civ. 0172, before the United States District Court for the Southern District of California. Accordingly, ICE is administratively closing your appeal pursuant to 6 C.F.R. § 5.9(a)(3).

Should you have any questions regarding this appeal closure, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal", your appeal number, which is **OPLA13-722**, and the FOIA case number, which is **2013FOIA9921**.

Sincerely,

Grace Cheng
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

From: Dany A, Rojas-Vega
100 Metros al Sur y 75 Metros al Oeste
Del Marisco Bar" Cocal-Puntarenas Costa Rica, Central America
Email;danyrojas4@gmail.com
Contact Phone # 619-752-8894

To; U.S. Immigration and Customs Enforcement
Office of Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Act Office

Submitted Via Email to; ice-foia@dhs.gov
Sunday March 17, 2013

NOTICE OF INTENT OF.: **PURUSING APPEAL**
STATUS OF: **PENDING APPEAL**
PENDING REQUEST TO: **EXPEDITE**

URGENT

Re: APPEAL NO: OPLA13-722

Dear. Sir or Madam Office of Legal Advisor at the law Division

OPLA13-722

This letter is notify this appellate body of my intent to pursue my Jan 28, 2013 appeal as well as subsequent filings to expedite appeal, although I was informed on March 13, 2013, via email and by phone by Mr. Ryan McDonald a paralegal from your office, that once I filed litigation it was your agency policy that the entire administrative and appellate processes stops and the matter is treated as closed by your agency.

For the record the FOIA complaint was filed before your office responded to my request/ referral . . . . In-addition the complaint was filed because your office failed to respond far above and beyond the statutory 10-day period from when the referral letter was dated Sept 19, 2012.

Lastly, it would benefit the interest of all parties if my appeal is decided, your law division would benefit because it could fix the '*years*' of past mistakes made at the lower levels and use its expertise in the 'discretionary' field while all will benefit by having your office develop a factual record for judicial review on this important request. See: *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C.Cir. 1990)(citing *McKart v. United States*, 395 U.S. 185, 194, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)(" allowing the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review.") Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. Id 395 U.S. at 194

In closing that the following request be GRANTED:

1. Case be reopened and that the administrative and appellate processes be continued
2. Expedite Appeal be GRANTED.
3. That the "copy of the state change of plea transcripts and related information or 25 withheld pages be disclosed"
4. That prior request made in the appeal and supplement be GRANTED.

I declare under penalty of perjury pursuant to the laws of the United States that forgoing is true and correct. 28 U.S.C. § 1746(1)

DATED; Sunday March 17, 2013

Respectfully Submitted

DANY ROJAS-VEGA

OPLA13-722
2013FOIA9921

From: Dany A, Rojas-Vega
100 Metros al Sur y 75 Metros al Oeste
Del Marisco Bar" Cocal-Puntarenas Costa Rica, Central America
Email;danyrojas4@gmail.com
Contact Phone # 619-752-8894

To; U.S. Immigration and Customs Enforcement
Office of Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Act Office

Submitted Via Email to; ice-foia@dhs.gov
Sunday March 3, 2013

Re-Consider Request.: **EXPEDITE APPEAL**
Request.: **Correct Address**
Request.: **Email Order**

RE.: OPLA13-722

Status.: ICE-FOIA APPEAL PENDING

Dear; Government Information Law Division Official.

This letter concerns my appeal that was filed on Jan 28, 2013 and assigned tracking number # OPLA13-722, or 2013FOIA9921; after speaking to "Mark" from the appellate division on Friday March 01, 2013 informing me that my appeal will at least take additional two weeks past the statutory time period of § 552(a)(6)(ii) of the FOIA to make a determination on the appeal.

Therefore, **Notice is hereby given** pursuant to 6 C.F.R § 5.5(a), that, I have yet receive any type of response from my request to expedite appeal submitted on Jan 28, 2013 whether it was granted or denied. Thus, this letter is to reinforce and support the same grounds found in paragraph 12 at section VI "Expedite Appeal Due Process and Equal Protection Claims" dated Jan 28, 2013, that my appeal be given "expedited treatment". See: Appeal at paragraph 12 "Expedite Appeal Due Process and Equal Protection Claims" dated Jan 28, 2013.

Title 6 of Part 5 of § 5.5(4) of Department of Homeland Security regulations, instructed agency to respond within the ten day period from Jan 28, 2013 when agency received my request for expedited treatment of appeal informing me if whether my request for expedited treatment was granted or denied. Id at § 5.5(4). I state that my appeal not only warrants expedited treatment but should not be delayed an additional two weeks past the statutory time period of § 552(a)(6)(ii) of the FOIA to make a determination on the appeal.

I. Re-Consider Request To Expedite Appeal

I am refilling my request to expedite appeal my request to expedite, my appeal met 6 C.F.R. § 5.5(3) of DHS regulations, it identified the constant, the real and genuine urgency warranting priority treatment over other pending appeals. Again See: *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991).("FOIA request accompanied by a showing of genuine urgency warrants priority over pending requests, at least as a matter of agency policy.") *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), holds that due process requires a respondent to have timely access to documents necessary to ensure a fair opportunity to present one's case in agency removal proceedings while *Harjo v. INS*, 832 F.Supp.2d 1095 (N.Dist Ct.2011), argued that *Dent's* reasoning should be applied: if a person can demonstrate that government delay in processing a FOIA request is going to impair substantial due process rights, then the FOIA request must be expedited. Here, I not only specifically showed that the delay of disclosure of specifically requested "state transcripts " not only impaired my due process rights to give evidence in agency proceedings and federal appellate level at the BIA and Ninth Circuit causing the case being decided against me in the **Matter of Dany Rojas-Vega, 14-649-662 (BIA 2004)** and **Rojas-Vega v. Gonzalez 154. Fed. Appx 25. 2005WL. 3037453 (C.A9)**, but I also demonstrated that the improper withholding of;

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2013FOIA9921

- State change of plea transcripts (Case No.: M707038) and related information or the 25 pages that was withheld from me by INS when I originally made my request for specific records in (**SND2003002513**)

Is also causing irreparable harm to my vested "uninhibited and unrestrained" statutory and constitutional right to proffer evidence on my behalf and having that evidence being decided on the merits at the Appellate Division of the San Diego, Superior Court, Central Division in *People v. Danny Rojas*, CA221317(2009) (currently pending), depriving me of my constitutional 'due process and equal protection rights as well as my sixth amendment' rights to being represented by competent appellate counsel at state level to vacate the state conviction on the merits as it occurred, long after agency proceedings terminated against me. Making me fall victim to misconduct at the state appellate level. Again see: Appeal at paragraph 12 "Expedite Appeal Due Process and Equal Protection Claims" dated Jan 28, 2013.

II. Grave Errors Committed by Agencies Are Not Attributable to The Requester

Its vitally IMPORTANT for me to bring to light all the grave errors INS-ICE-USCIS has committed in this FOIA request dating back to July 25, 2003 ..... to 2009 to the recent unreasonable delay in processing my present request... None of these grievous errors can be remotely attributable to or linked to me.

1. **Right To Be Notified of Right to Appeal to INS Appellate Body Adverse July 2003Decision To Withhold Responsive to Specific Records Requested**

This board should consider when determining if whether to grant or deny my request to expedite appeal the following three additional grave error committed by agency:

- On July 25, 2003, INS did not inform me that I could have appealed to their appellate body its decision to withhold 25 pages responsive to my specific request for a copy of the state transcripts. when INS decided to withhold records in its possession and control at the time my request was processed. See denial letter dated July 25, 2003 (**SND2003002513**) Exhibit 7(ii).

By not notifying me of my substantial right to appeal to agency's appellate body its decision to withhold 25 pages of documents responsive to my specific request violated both FOIA 5 § 552(a)(6)(a) and 8 C.F.R. § 103.10(d)(2) of DHS regulatory and statutory fair notice practice provision that was clearly promulgated in 5 § 552(a)(6)(a) and 8 C.F.R. § 103.10(d)(2) at the time I filed my request , furthermore the INS official who made the determination to withhold the state records remains unknown because s/he did not comply with their statutory and regulatory obligation to have signed the letter. See; USCIS-FOIA letter dated 06 18, 2013

2. **Once INS Obtained The Copy Of The State Change Of Plea And Sentencing Proceedings From The State It Was Irrelevant And Immaterial That The State Had Destroyed Their Own Copy Of The State Transcripts And Related Information**

The *second* grave error and FOIA violations did not stop at INS failing to notify me of my right to appeal its decision to its appellate division but went further when USCIS Chief Gregory went beyond USCIS search employees simple findings that the responsive records could be located in my A-File at the time request was processed by pointing to state documents specifically ". . .[P]etition for Writ of State Error". Page 19 for its grounds for denying my appeal. See; Exhibit A: **APP2009000724**

USCIS Chief Gregory grounds to deny my appeal is now used in a different context, its now used to prove that USCIS not only knew exactly what state documents was requested but it was actually the documents that INS did in fact withhold from me in (**SND2003002513**) since USCIS specifically pointed to Petition for Writ of State Error Corum Nobis. Secondly, USCIS indisputably did not state USCIS or ICE destroyed their own copy located in A-file but that the state destroyed their own copy .....

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3. **The Present FOIA Request Was USCIS To Correct Its "Bad Faith And Grossly Inadequate Search And "Wholly Unsupported Findings Made By Chief Gregory From USCIS Appellate Body**

The third present FOIA request was specifically to conduct another search for the missing copy of the state 'transcripts/information" which INS found but withheld from me which in a subsequent request USCIS was unable to locate in its own files because it relied on State files, this present request USCIS corrected its mistake by finding the missing withheld documents from its own federal (A)-file.

Agency Records

In closing it's important to note that in my supplemental appeal page 3-4 section II that it was demonstrated that once INS responded to my specific request by withholding 25 pages of documents responsive to request it met the **" custody** and **control"** test described in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144, it met the **"create or obtain" test described in *Forsham v. Harris*, 445 U.S. 169, 182, adopted by In *Burka v. US Dept. of Health and Human Services*, 87 F.3d 508 at 515 (D.C. Cir. 1996). quoting *Tax Analysts v. United States Dep't of Justice*, 269 U.S. App. D.C. 315, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136, 109 S. Ct. 2841 (1989))** See also; ***Julian v. United States Department of Justice*, 806 F.2d 1411, 1415-16 (9th Cir.1986), *cert. granted*, __ U.S. __, 107 S.Ct. 3209, 96 L.Ed.2d 695 (1987)(presentence report is agency** records, when in agency possession)

Issues To Be Resolved Ten years later is whether does the exemptions INS committed itself to justify in **(SND2003002513)** applied then and most importantly do the exemptions apply now 10 years later. I maintained that the claimed exemptions applied by INS to the copy of the "change of plea and sentencing" transcripts was not then and is not now subject to any exemptions relied on by INS-ICE. See; ICE-FOIA appeal at "specific request" page 2.

Additionally, although INS-ICE did not physically create a copy of the "change of plea and sentencing transcripts and related information in case no; M707038" was nonetheless developed specifically for agency "decision making" under the promise agency could not evade disclosure in agency proceedings regardless if the disclosure could or would reveal errors and failures, or because of speculative or abstract fears of agency officials. Those records was forbidden from being be kept from the courts scrutiny and analysis as the well as the public's view. . . .

III. ICE is Committed to Justify INS 2003 Exemption

As stated in my supplemental at footnote 1 the present request encompasses and covers all FOIA request dating back to 2003, thus my challenge to the 2003 withholding is also not barred by the statute of limitations **28 U.S.C. §** 2401(a) **under** *Oglesby v. Dep't of the Army*, 920 F.2d 57, 63 (D.C. Cir. 1990) (*Citing Spannaus v. United States Department of Justice*, 824 F.2d 52, 55 (D.C.Cir.1987)

Requested Relief, I request that my appeal be given expedited treatment to prevent any further irreparable substantial constitutional, regulatory, statutory harm from occurring and that both orders granting or denying request be emailed to me AT; Email; danyrojas4@gmail.com or danyrojas4@yahoo.com as well as the order letter granting or denying appeal while mailing the CD by mail to the correct address.

I declare under penalty of perjury pursuant to the laws of the United States that forgoing is true and correct. 28 U.S.C. § 1146(1)

DATED; SUNDAY MARCH 03, 2013

Respectfully Submitted

DANY ROJAS-VEGA

From: Danny A, Rojas-Vega
Email; dannyrojas4@gmail.com
Contact Phone # 619-752-8894

Emailed toice-foia@dhs.gov
SAT FEB 02, 2013

To; U.S. Immigration and Customs Enforcement
Office of Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Act Office

SUPPLEMENTAL TO
FREEDOM OF INFORMATION ACT APPEAL
RE: 2013FOIA9921

Dear: Associate General Counsel FOIA/PA, Appellate Office,

This letter is to SUPPLEMENT the "appeal" that I filed on Monday January 28, 2013 where I appealed determination made by *Catrina M. Pavlik-Keenan*, FOIA Officer on 01/ 18/ 2013. The envelope containing the denial letter and CD that was processed on Jan Friday 18, 2013 and "Postmarked Jan 22, 2013" was received on Wednesday Jan 30, 2013.

After reviewing the combination of the documents found within the CD and the denial letter, the asserted ICE-FOIA appeal claims found in page 3 paragraphs 6-7 and footnote 2 remains the same except that the number of pages omitted from the denial letter has now changed from 79 pages to approx 90 pages or more.

In-accordance with the fair notice policy promulgated in 6 C.F.R. §5.6(c) of the DHS regulations only "**one**" instance exist when "[a]n estimate of the volume of records or information withheld, in number of pages need not be provided and that's when [t]he estimate is otherwise indicated through deletions on records disclosed in part." *See;* Id at §5.6(c).

Omitting from the denial letter that approximately 90 pages of documents being withheld in full or more is unquestionably not the case, "[t]he number of pages complained about that is being withheld was in "full" not in "part" documents withheld in full was required by 6 C.F.R. §5.6(c)(3) to have been clearly identified in the letter and not omitted entirely from the denial letter.

I. Number Of Pages Omitted From The Denial Letter

1. This supplement is intended to fill in the gaps of my appeal that was filed before receiving the CD, after reviewing the combination of the C.D and the denial letter, the denial letter did in fact omitted a massive amount of pages withheld in full. To make matters worse despite of ICE-FOIA Supervisor Todd Fuss, assurances over the phone on Jan 25, 2013 that the 379 pages was released in full except for sparse and low grade redactions under various provisions of FOIA and PA , those assurances were empty and simply and plainly untrue. Because upon review of the CD and compared to the letter

2. The Jan 18, 2013 initial denial letter omitted approximately seventy-six (76) pages were withheld in full under (b)(5): (k)(2); (b)(6); (b)(7)(c), the pages being exempted in full are pages:

> "48, 49, 50, 59, 60, 61, 62, 64, 74, 73 145, 156, 158, 160, 161, 162, 163, 164, 166, 167, 168, 169, 176, 177, 178, 179, 180, 182, 191, 192, 193, 196, 197, 198, 200, 202, 206, , 227, 238, 239, 257, 258, 259?, 260, 261 261, 264, 265, 268, 269, 272, 278, 279, 280, 281, 282, 284, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 326, 327, 330, 346, 370"

3. An additional twenty (20) pages were exempted in full under Exemption (b)(5), the pages being exempted in full are pages:

"52, 53, 54, 57, 58, , 66, 75, 157, 165, 173, 174, 180, 181, and pages 203, 103, 204, 266, 267, 270, 271, 283."

4. As well as pages 63, 69, 78, 94 were additionally withheld in full under Exemption (k)(2); (b)(7)(e) amounting to four pages.

5. The total amount of pages withheld in full is approximately ninety (90) pages, this was a substantial and significant amount withheld pages that was omitted from the Jan 18, 2013 denial letter.

6. Ultimately, the letter gave a "false" impression to the reader that "three hundred and seventy nine (379) pages were in fact "enclosed in the CD, when in "materiality and reality" only two hundred and eighty nine (289) pages were actually released in "part" with exception of minor redactions or excisions and "ninety (90) pages were in "fact" withheld in full." I'm requesting that if any documents are withheld in full that that number with the exemption it relied on be incorporated into the appeal response letter.

***Post Decisional* Records Are Not Exempt**

7. Despite this fact I continue to maintain the asserted reasons given in my eleven (11) page FOIA-APPPEAL that these exemptions whether if claimed exempt under (b)(5): (k)(2); (b)(6); (b)(7)(c) or (b)(5) or even under (k)(2); (b)(7)(e), they are not exempt because no harm would result if the documents are disclosed. In order for any-one of the 90 pages any portions of the 90 pages they must be *"pre-decisional"* and not *"post decisional"* even under the "blanket" of exemptions ICE threw on a majority of documents if not all of the 90 pages. It cannot be over stressed or emphasized on the fact that the majority if the not the entire documents or portions are *"post decisional"* and not *"pre-decisional"*. The law is to withhold materials it must be clear that the disclosure would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions. The burden is on withholding agency to prove the documents are *"pre"* decisional and not *"post"* decisional. Additionally, ICE must prove that the FOIA of the APA defines the State agencies or bodies as federal agency thereby the transmission from the state to INS becomes *"inter agency"* exempting the transmission of the copy of the change of plea transcripts, memorandum, letters, bench notes, state prosecutors notes or any state documents memos information transmitted from the state to INS relating to the October 06, 1995 state proceedings in case no.: M7070738. *See;* Page 4 of APPEAL

Segregate

8. While some might fall within one or even two of the blanketed exemption that is relied the remainder of information must be released as the law of section (b)(5) mandates the segregable portions or non-exempt information be segregated from the non-exempt material and released to me.

Since again the majority of the documents are dated before 2006 which undisputed will fall squarely in the *"post decisional"* instead of *"pre-decisional"* there is no real threat to releasing *"post decisional"* information since there is no pending enforcement proceeding that could be inerferred with, jeopardized or be undermined.

II. The Records Were "Created or Obtained" by ICE

9. For the reasons stated in my ICE-FOIA appeal at page 2 section "specific request" and paragraph 2, the overwhelmingly strong evidence shows that I requested the change of plea and sentencing proceedings and related information in INS possession and custody which INS found but withheld from me therefore those specific records was "created or obtained" by the INS. See; *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144, 109 S.Ct. 2841, 2848, 106 L.Ed.2d 112 (1989) A brief summary of how –and, importantly, when – the records was discovered INS possession demonstrates this point.

10. These records was already in the INS's possession when I filed my first FOIA request specifically requesting the records and INS was required by law to furnish me with records in its possession when the request was processed unless they clearly fall within a exemption, in this INS determined that my request clearly fell within various provisions of PA and FOIA. See 2 section "specific request of ICE-FOIA appeal see also USCIS-FOIA appeal dated May 21, 2012 at page 4 footnote 1.

11. Under the second prong of *Tax Analysts*, ICE must determine whether the "change of plea and sentencing proceedings was under the ICE "control" at the time that I made my first FOIA request. By "control," the Supreme Court "mean[t] that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Infra Tax Analysts*, 492 U.S. 136 at 145, 109 S. Ct. at 2848. In *Burka v. US Dept. of Health and Human Services*, 87 F.3d 508 at 515 (D.C. Cir. 1996). quoting *Tax Analysts v. United States Dep't of Justice*, 269 U.S. App. D.C. 315, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136, 109 S. Ct. 2841 (1989)). The D.C. Cir. In *Burka* identified four relevant factors to a determination of whether an agency exercises sufficient control over a document to render it an "agency record": "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

Under first factor **(1) the intent of the document's creator (here the INS or ICE) to retain or relinquish control over the records;** once I requested the documents and INS withheld them from me, INS was required to retain them for six years. The second factor to consider is; **(2) the ability of the agency to "use and dispose" of the record as it sees fit; had I not filed my FOIA request**. If I would not have requested to records INS could have disposed of the documents as it pleased, however once I requested them and INS withheld them INS was required by FOIA guidelines, 6 C.F.R. § 5.10 and General Records Schedule 14 to have preserved the request and denial dating back to 2003 to the 2009 FOIA request [1]/ See e.g.,; The D.C Court in *Bureau of Nat. Affairs v. US Dept. of Justice*, 742 F.2d 1484 (D.C. Cir. 1984). held that an agency should not be able to alter its disposal regulations to avoid the

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1/ The retention and preservation period for FOIA request and responses is governed by the National Archives and Records Administration General Records Schedules. Rule 11(3)(a) instructs agencies to preserve FOIA records when records are withheld "in full or in part" for six years where an appeal is not taken. Id. While Appeal files are retained under Rule 12 appeal and are preserved for 3 years after it receives "final adjudication" my 2009 FOIA request in (APP2009000724) received "final adjudication at the U.S. Supreme Court in *ROJAS-VEGA v. BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT*, 133 S. Ct. 326 (U.S. 2012).

The FOIA files consist of the original request, a copy of the reply, and all related supporting files the administrative appeals files consist of the information denied by the agency, . appellant's letter, a copy of the reply thereto, and related supporting documents. . . Id at Rule 11(3)(a) and Rule 12(a) and 6 C.F.R. § 5.10
The D.C Court in *Bureau of Nat. Affairs v. US Dept. of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), held that an agency should not be able to alter its disposal regulations to avoid the requirements of FOIA.

requirements of FOIA; The third factor to be considered is; **(3) the extent to which "agency personnel have 'read or relied' upon the document"** weighs even heavier on ICE since they were required to read my FOIA request to determine whether to release the "change of plea transcripts" and "related information" or withheld them satisfying the third 'read or relied' upon the document" factor. The fourth and final factor to be considered is; **(4) the degree to which the document was integrated into the agency's record system or files. The focus is whether were the documents integrated into the agency's record system or files.** As stated in page 2 paragraph 2 of my FOIA-Appeal based on the Declaration of Dominick Gentile paragraph 5, An A-File is normally stored at any USCIS, CBP or ICE facility. . . . In addition, USCIS stores the retired files at the Federal Records Center (FRC), National Archives and Records Administration (NARA). Therefore the document's clearly integrated into the agency's record system or files.

Based *Tax Analysts*, 492 U.S. at 144 and the four principles described in *Burka*, 87 F.3d at 555, and *Tax Analysts* 845 F.2d at, 1069 ICE cannot reasonably or argue in good faith that the four factors are not met by me once the "change of plea and sentencing proceedings and related information that was requested and INS found but withheld 25 pages in full in 2003 are created (or obtained) and controlled by INS now ICE and are therefore "agency records" for FOIA purposes. See; Again section "specific request" also see: pages 2-3 of my FOIA-APPEAL Dated Jan 28, 2013,.

III. *Search*

12. As stated above, this supplemental is to make certain that neither the law nor the facts of my request can be ignored by incorporating herein the Jan 28, appeal, If the "transcripts are not within the withheld pages then the law entitles me to another search until USCIS uncovers all the specific and relevant documents responsive to my FOIA request. *See also e.g.*, *Kronberg v. U.S. Dep't of Justice*, 875 F.Supp. 861, 871 (D.D.C. 1995). The FOIA confers upon each requester a right to a reasonable search, and when an agency search is demonstrated to be unreasonable, the FOIA requester is entitled to judgment as a matter of law and a new search. See; again; *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F.Supp.2d 146, 156 (D.D.C.2004)("a "rigorous" second search in satisfaction of its FOIA duties") (*Citing Judicial Watch, Inc. v. Dep't of Commerce*, 34 F.Supp.2d 28, 46 (D.D.C.1998).

IV. **Conclusion**

13. In conclusion I request the following relief numbers 1-6 found in the 01/28/2013 FOIA-APPEAL

14. That another more rigorous and stringent search be conducted to uncover the specific "change of plea and sentencing proceedings and related information. . that was originally withheld from me

15. that the number of pages being withheld in full or in part be affirmatively shown in the affirmance letter In accordance with 6 C.F.R. §5.6(c)

I declare under penalty of perjury pursuant to the laws of the United States that forgoing is true and correct. 28 U.S.C. § 1746(1)

Executed on; Feb 2[illegible], 2013

Respectfully Submitted

DANY ROJAS-VEGA

Supplemental FOIA-APPEAL
2013FOIA9921

U.S. Department of Homeland Security
500 12th Street, S W , Stop 5009
Washington, D C 20536-5009

U.S. Immigration and Customs Enforcement

January 18, 2013

Dany Alberto Rojas Vega
100 Metros al Sur-y 75 Metros al Oeste
Del Marisco Bar
Cocal Punarenas, Costa Rica

Re: ICE FOIA Case # 2013FOIA9921
USCIS FOIA Case # NRC2012052309

Dear Mr. Rojas Vega:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Citizenship and Immigration Services (USCIS), dated May 20, 2012. You are seeking all immigration records pertaining to Dany Alberto Rojas Vega.

A search of USCIS for records responsive to your request produced 379 pages of documents that originated from U.S. Immigration and Customs Enforcement (ICE). USCIS referred these documents to ICE for review and processing under the FOIA.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual[1] unless the agency has exempted the system of records from the access provisions of the Privacy Act.[2]

After a review of the records referred by USCIS, I determined that portions of the documents will be withheld pursuant to Exemption (k)(2) of the Privacy Act and Exemptions (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E) of the FOIA.

Privacy Act Exemption (k)(2) exempts from mandatory disclosure investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence.

FOIA Exemption 5 ICE has applied Exemption 5 to protect from disclosure intra-agency documents that contain the recommendations, opinions, and conclusions of agency employees. The disclosure of candid opinions and inhibit the free and frank exchange of information and opinions among agency personnel on important agency decision-making by having a chilling effect on the agency's deliberative process

[1] 5 U.S.C. § 552a(d)(1).
[2] 5 U.S.C. §§ 552a(d)(5), (j), and (k).

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I have determined that the responsive documents qualify for protection under the deliberative process privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement official names and third-party information contained within the documents.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

ICE has applied FOIA Exemption 7(E) to protect from FBI IDs and law enforcement system checks contained within the documents.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. I have determined that disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

PROOF OF SERVICE BY A PERSON OUTSIDE

THE UNITED STATES

I, **DANNY ROJAS**, the undersigned, certify, and do declare , that I am over the age of 18 years, and I am party to the attached foregoing cause of action and that on Friday, the 11 TH day of the SEVENTH MONTH of the year 2013. I caused to serve a true copy of;

(1) MOTION TO PROCEED IN FORMA PAUPERIS AND DECLARATION; (2) NOTICE OF ORDER TO FILE FOIA COMPLAINT IN THE DISTRICT COURT OF COLUMBIA AND (3) COMPLAINT AND EXHIBITS: (4)

By placing the original in a self- addressed envelope with a prepaid stamp affixed to envelop and depositing it in a PUNTARENAS post office mailbox located in COSTA RICA, CENTRAL AMERICA,

addressed to the following persons:

U. S. District Court
for the District of Columbia
333 Constitution Ave., N.W.
Washington, DC 20001

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. 28 U.S.C. §1746(1).

Respectfully Submitted

DANY ROJAS-VEGA
Email;danyrojas4@gmail.com
Contact Phone # 619-752-8894
D.C. 13-cv-172-LAB
United States District Court for the
Southern District of California

Sucursales de Correos de Costa Rica en las cuales puede hacer los envíos:

SAN JOSE	TELEFONO
Correo Central	2223-9005
San Francisco	2286-4108
Pavas	2232-0333
Desamparados	2219-2702
La Y Griega	2227-2737
Zapote Ext 4083	2202-2900
Escazu	2288-0239
San Marcos de Tarrazú	2546-6325
Perez Zeledon	2771-0346
Santa Ana	2282-7403
San Pedro de M O	2253-4633
	2253-6895
Tibás	2297-0767
Alajuelita	2254-6826
Guadalupe	2253-5349
San Sebastian	2226-1455
La Uruca	2223-6492
Coronado	2229-1151
HEREDIA	
Heredia	2260-0461
San Antonio de Belen	2239-4797

ALAJUELA	TELEFONO
Alajuela	2443-2653
Grecia	2494-4501
Naranjo	2451-4720
Ciudad Quesada	2460-3399
CARTAGO	
Cartago	2552-4595
LIMON	
Limón	2758-3471
	2798-4691
Guacimo	2716-5028
Guápiles	2710-7203
Cahuita	2755-0096
GUANACASTE	
Liberia	2666-1649
Nicoya	2685-5088
	2686-6402
Playas del Coco	2670-0418
La Cruz	2679-9329
PUNTARENAS	
Quepos	2777-1471
Jacó	2643-2175
Puntarenas	2661-2156

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Zumen	Ciudad Sandino	Condega	Nandaime
San Luis	Las Amercas	Corinto	Nueva Guinea
Linda Vista	Centro Corporativo- Banpro	Corn Island	Masaya
Mercado Oriental	Santo Domingo	Diriamba	Matagalpa
Portezuelo	Aeropuerto	El Rama	Ocotal
Roberto Huembes	Altamira	El Sauce	Ometepe
C C Managua	Tipitapa	El Viejo	Pueblo Nuevo
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Plaza Inter	Ciudad Jardín	Granada	Rio Blanco
UCA	Plaza La Colonia	Jalapa	Rivas
Nejapa		Jinotega	San Carlos
Ticomo	**DEPARTAMENTOS**	Jinotepe	San Juan de Limay
Rocargo	Bluefields	Juigalpa	San Rafael del Sur
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Sur	Camoapa	La Paz Centro	Somoto
	Chichigalpa	Leon	Sutiava

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